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No. 64

In the Supreme Court of the United States

OCTOBER TERM, 1950

MADELEINE URSULA SNYDER, PETITIONER

v.

REAR ADMIRAL W. A. BUCK,
PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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peal would be frustrated, and the court would be prevented from giving "judgment as the right of the cause shall appear to it." *Hoiness* v. *United States*, 335 U.S. 297, 300-301.

I

Abatement of this entire action could have been avoided only by the timely substitution of Rear Admiral Buck's successor, as required by Section 11 of the Judiciary Act of 1925

The history and purpose, as well as the language, of Section 11 of the Judiciary Act of 1925, *supra*, p. 3, establish that an action for a writ of mandamus or a mandatory injunction, whether or not reduced to judgment, abates upon the expiration of six months after the death or resignation of a public officer defendant, unless a proper substitution of the successor has been made within that time. Moreover, the decisions of this Court interpreting Section 11 and antecedent enactments show that such actions abate (1) whether the resignation of the public officer occurred before or after judgment was entered by the trial court, and (2) whether that trial court judgment was in favor of, or against, the resigned officer. These considerations, we submit, justify an affirmance of the decision below. It is significant that such an affirmance here, while defeating the action for the present, does not bar petitioner from commencing it against the proper defendant.

of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

STATEMENT

In 1937 petitioner married one James John Ford in Pennsylvania (R. 12-13). They lived together as husband and wife in New Jersey until November 15, 1944, when they separated, and they did not live together thereafter (R. 13). In May 1945, a decree of divorce purporting to dissolve their marriage was entered in a court in Chihuahua, Mexico (R. 13). Neither petitioner nor Ford were residents of, or domiciled in, Mexico at the time of or prior to the entry of the decree; all negotiations leading up to the entry of the decree were handled through correspondence with attorneys in Mexico (R. 13).

On July 3, 1945, at Elkton, Maryland, petitioner participated in a marriage ceremony with Charles Richard Snyder, who was in the naval service and a resident of New Jersey (R. 13-14). Shortly thereafter, Snyder designated petitioner as principal beneficiary and his sister, Dorothy Helen Reul, as contingent beneficiary for the six-month gratuity allowance payable by the United States upon his death in the service (R. 24). Petitioner and Snyder lived together in New Jersey until March 10, 1946, when Snyder, who was still in the service, died (R. 14).

After Snyder's death both petitioner and Dorothy Helen Reul filed claims with the Navy Department for the death gratuity allowance, amounting

to $1,365.00, the equivalent of six months pay at the rate earned by Snyder at the time of his death (R. 24-25). The Navy Department ruled that petitioner's Mexican mail-order divorce had been legally ineffective to dissolve her marriage to Ford, so that she never had become the legal wife of Snyder and therefore was not his legal widow, and hence, not entitled to the death gratuity under the Act of June 4, 1920 (41 Stat. 824, as amended, 34 U.S.C. 943). Instead it paid the gratuity to his sister, in accordance with the 1920 Act (R. 5, 25).

Petitioner, claiming to be the lawful widow of the deceased serviceman, then instituted the instant action in the United States District Court for the District of Columbia against "Rear Admiral W. A. Buck, S. C., U. S. N., Paymaster General of the Navy, Defendant." Her suit took the form of a "Petition in the nature of mandamus to compel [the] Paymaster General of the Navy to pay widow's allowance." (R. 1-2). On January 29, 1948, the district court, deciding that petitioner was entitled to the death gratuity, overturned the Navy Department's ruling and, while observing that a writ of mandamus would be improper, nevertheless issued a mandatory injunction against Buck as Paymaster General.[3] The injunction di-

[3] The district court recognized that it had no authority to issue a writ of mandamus in this case, since the duty which the suit sought to have performed was not wholly ministerial. It held, however, that Section 10 of the Administrative Procedure Act (60 Stat. 237, 243; 5 U. S. C. 1009) created a

rected him to pay petitioner the six-month death gratuity in the amount of $1,365.00 (R. 39, 40-41). On March 18, 1948, notice of appeal from the district court judgment was filed in the name of Rear Admiral Buck as Paymaster General (R. 41).

Prior to the filing of that notice and on March 1, 1948, Rear Admiral Buck had been retired and had been succeeded in office on that date by Rear Admiral Edwin D. Foster as the new Paymaster General (R. 44). Rear Admiral Foster's nomination to the office of Paymaster General had previously been confirmed by the Senate on February 18, 1948, for a four-year term (R. 44). Petitioner made no effort to have the succeeding Paymaster General substituted for Rear Admiral Buck within six months after the latter had vacated that office, as provided by Section 11 of the Judiciary Act of 1925, *supra*, p. 3, which had been incorporated into Rule 28(b) of the General Rules of the Court of Appeals for the District of Columbia Circuit.[4] In the court of appeals, the Government

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remedy and authorized the issuance of a mandatory injunction (R. 32). In the court below, the Government urged that the district court erred in invoking the Administrative Procedure Act, since the Tucker Act (28 U. S. C. 1346(a)) provides a judicial remedy for recovering death gratuities.

[4] Rule 28(b) expressly provided that "the matter of abatement and substitution is covered by Section 11 of the Act of February 13, 1925, c. 229 [43 Stat. 941]." Subsequent to the repeal of Section 11 (*supra*, p. 3, note 2), Rule 28(b) was amended so as to delete the reference to Section 11 and substitute a reference to Rule 25(d) of the Federal Rules for Civil Procedure. 84 App. D. C. IX-X.

attorney called these facts to the court's attention, but suggested that it had no desire to have the cause abated because of petitioner's failure to comply with Section 11 (R. 45-46). The court below, nevertheless held that the action had abated because of the failure to substitute Rear Admiral Foster within the statutory six-month period (R. 47). Consequently, without passing on the merits of the case, the court ordered that the judgment of the district court be vacated as abated, relying on that portion of this Court's opinion in *Defense Supplies Corp.* v. *Lawrence Co.*, 336 U. S. 631, which discusses *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590 (R. 47).

Petitioner had also instituted a separate action against the United States in order to reverse a Veterans' Administration decision, which, because of the invalid Mexican mail-order divorce, held her ineligible to receive National Service Life Insurance proceeds of a policy in which Snyder had designated her as the principal beneficiary and his sister as contingent beneficiary. The same district judge who awarded the mandatory injunction in the present case sustained her contention that she was the widow of the insured for the purpose of receiving National Service Life Insurance benefits and entered judgment in her behalf in that case as well. On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that the invalid Mexican mail-order divorce pre-

vented petitioner from becoming the lawful wife of the insured, and, in effect, directed that the insurance proceeds be paid to Dorothy Helen Reul. *United States* v. *Snyder,* 177 F. 2d 44. Petitioner did not seek review of that decision of the court of appeals, which was handed down on July 5, 1949.

SUMMARY OF ARGUMENT

The Government has no desire that this case be abated. In the court below Government counsel suggested that the case fell within the ambit of this Court's decisions in *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 426, and *Hiatt* v. *Smith,* 336 U. S. 908, since a retired admiral may be called back to active service and that the court below might therefore find that the case had not abated. There may be doubt however that the *Volpe* and *Hiatt* cases apply to a Paymaster General of the Navy, whose appointment must be confirmed by the Senate. If, on the other hand, this Court should consider that the cause has not abated, we suggest that the present Paymaster General, Rear Admiral Charles W. Fox, be substituted as party respondent, and that the decision be reversed and the case remanded for consideration of the merits. Otherwise, we submit that the decision of the court below is correct.

I

A. Early in the history of writs sued out against federal officers it was established by this Court that suits of that character abate upon the death or

resignation of the officer, and that, in the absence of a proper statute, the successor officer could not be substituted even with his own consent. The reason behind the rule was that the officer was powerless to perform the duty after he left the office, and the court could not compel him to perform after his power to perform had ceased. And the successor could not be substituted, since the substitution would, in effect, be the institution of an original suit in the appellate court.

In 1899, Congress enacted a statute expressly providing that such suits should not abate and that the successor officer might be substituted within twelve months.

B. In 1925, the 1899 provision was superseded by Section 11 of the Judiciary Act of that year. The new statute eliminated the provision that "no action should abate" upon the death or resignation of a public officer, but provided that the action might be continued if the successor should be substituted within six months after the death or resignation.

C. Under the 1899 Act this Court held that where no substitution had been made within the statutory period of twelve months the action could not be continued, but merely dismissed the proceeding in this Court without disturbing the judgment of the trial court. After the passage of the 1925 Act, which eliminated the provision that no action should abate, this Court held that in the absence of proper substitution the entire proceed-

ing abated, including the judgment of the trial court. Accordingly, this Court adopted the practice of directing the trial court to vacate the judgment and dismiss the suit as abated.

1. (a) Petitioner's contention that a judgment in mandamus entered against a public officer prior to his death or resignation did not abate at common law is erroneous. The cases upon which she relies relate to suits in assumpsit brought against collectors of the revenue to recover taxes erroneously collected. Those suits were brought for money judgments and the collectors were liable personally to pay the judgments recovered. Moreover, the judgment recovered in such suits could be revived against the legal representatives of the deceased and collected from the collector's estate. Actions for mandamus, however, seek only a coercive remedy against the public officer defendant. In such suits, the court may order him to perform a duty, which may include the payment of money, but the officer is not liable in his estate for the payment. The writ of mandamus does not reach the office, but only the individual. Since the officer can perform the duty only so long as he holds the office, the court cannot coerce him to pay after he has left it.

(b) Petitioner asserts that none of the decisions of this Court on abatement involved a judgment entered *against* a public officer. However, this Court has stated that the *writ* of mandamus abates

upon the death or resignation of the officer. *United States* v. *Boutwell,* 17 Wall. 604, 607. Another decision of this Court reversed a court of appeals' decision directing the trial court to release a relator in a habeas corpus proceeding. *Matheus* v. *United States ex rel. Cunningham,* 282 U. S. 802. And the reason for abatement is as forceful where the judgment is entered against the officer as where it is in his favor.

In reality, the reason behind the abatement is that the case is moot, since after the death or resignation there is no longer any subject matter on which the court can act. It has long been the practice of this Court in moot cases to order the judgment of the trial court vacated and the proceeding dismissed.

2. Petitioner's contention that there was no action pending because the action merged into the judgment, and because there was no valid appeal taken, is without merit. The entry of a trial court judgment does not mean that there is no longer a case pending. The cause is still pending until the judgment is satisfied.

The contention that no valid appeal was taken is plainly inconsistent with petitioner's further contention that respondent is personally liable to pay the judgment. If he has liability to pay, he must have had a sufficient interest to warrant his taking an appeal. *Davis* v. *Preston,* 280 U. S. 406, is inapposite. Davis was agent for the purpose of

the suit. When he ceased to be agent he had no further authority. He was, therefore, denied the right to take an appeal, but he was not held liable for the judgment. If the instant case did not become moot by reason of his retirement, respondent was liable to coercive action by the trial court, and consequently had sufficient interest to take the appeal.

3. Petitioner has no ground for estoppel. The appointment of respondent's successor in office was a matter of public record. She had ample opportunity to ascertain the facts. In any event, the taking of the appeal in respondent's name was obviously not a deception.

D. The abatement of the judgment does not leave petitioner without a remedy. She may bring a new action against the present Paymaster General, or she may bring an action against the United States under the Tucker Act (28 U.S.C. 1346(a)).

E. Should this Court hold that the case abated, affirmance is proper. Should it hold to the contrary, the case should go back to the court of appeals for a decision on the merits. Petitioner's request that in the event of reversal, the remand should direct the court below merely to dismiss the appeal, letting the judgment stand, is inconsistent with her assertion that respondent had no right to appeal because of his retirement, since she claims that he is liable to pay the judgment. If any controversy remains with respondent, he obviously had a right to take the appeal.

II

28 U.S.C. Section 2105 may preclude this Court from reversing the ruling below, since it provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

This provision can be construed as inapplicable on the ground that abatement for failure to substitute involves jurisdiction. But if *Bowles* v. *Wilke*, 175 F. 2d 35 (C.A. 7), certiorari denied, 338 U. S. 861, is good law, this Court lacks jurisdiction to reverse the decision below.

ARGUMENT

At the outset of our discussion, we wish to make it clear that we have no desire that this case be abated. In the court below government counsel pointed out that since Rear Admiral Buck's successor had not been substituted in the case within the statutory six-month period, a question of abatement had arisen. Government counsel further pointed out that because Rear Admiral Buck was in a retired status, he might be called back to active service by the Secretary of the Navy. It was, therefore, suggested that the case at bar was within the ambit of this Court's decisions in *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 426, and *Hiatt* v. *Smith*, 336 U.S. 908, and that the court below might appropriately hold, on the authority of those cases, that the case had not abated, and

it was requested that Rear Admiral Buck's successor be substituted in his place (R. 44-46). The court below declined to follow that request.

There may, of course, be some doubt whether this case falls within the *Volpe* and *Hiatt* cases, since a naval officer appointed as Paymaster General of the Navy must be confirmed by the Senate (34 U.S.C. 11). Consequently, even if the Secretary of the Navy should call Rear Admiral Buck back to active duty, it is not entirely clear that he could legally perform any of the duties of the office of the Paymaster General of the Navy without a further appointment by the President and confirmation by the Senate. On the other hand, it may not be illogical to say that the Secretary might legally call him back to active service as Paymaster General for the purpose of completing, *nunc pro tunc*, an unfinished duty which he had been ordered by the court to perform a short time prior to his retirement. Accordingly, if this Court should consider that the cause has not abated, the Government respectfully requests, in order that the caption of the case may reflect the present situation, that the present Paymaster General of the Navy, Rear Admiral Charles W. Fox,[5] be substituted as party respondent in this Court in the place of Rear Ad-

[5] We are advised by the Department of the Navy that Rear Admiral Charles W. Fox entered on duty as Paymaster General of the Navy on October 4, 1949, he having been confirmed by the Senate for appointment to that post on September 8, 1949, for a term of four years. See 95 Cong. Rec. 12731.

miral W. A. Buck; and that this brief be treated as a motion for that purpose. Should this Court deem it appropriate to make the substitution, it is suggested that the judgment of the court below be vacated, and the cause remanded to that court for a decision on the merits of the case.

In the event this Court should deem that the substitution suggested above is unauthorized or inappropriate, the first question for discussion is whether, in the circumstances of this case, Section 11 of the Judiciary Act of 1925, *supra*, p. 3, authorized the court below to abate the proceeding and vacate the mandatory injunction issued against Rear Admiral Buck prior to his retirement from active service, because his successor, Rear Admiral Foster, was not substituted in his place as defendant within the six-month period provided in that section. We believe that the language and history of Section 11 and the principles adopted by this Court and other courts in interpreting that section, furnish ample support for the action taken by the court below. We submit, therefore, that, in the absence of timely substitution, the decision of the court below is correct and should be affirmed. Should this Court disagree with our contention and reverse the decision of the court below, it should not, as petitioner urges, merely direct the court of appeals to dismiss the appeal. In the event of reversal, the remand should direct that the court of appeals consider the case on the merits. Otherwise, the right of ap-

A. *The legislative Background of Section 11.*

Early in the history of writs sued out against federal officers to compel performance of official acts, it was established that the death, resignation, or expiration of the term of office of the defendant *pendente lite* compelled the action to abate and forced the plaintiff to sue out another writ against the new incumbent. Over 80 years ago this Court, in a suit against a Secretary of the Interior, recognized that "when he resigned, of course the suit abated." *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313. This ruling was uniformly followed in all other cases reaching this Court concerning the same question. *United States* v. *Boutwell,* 17 Wall. 604, 609; *Commissioners* v. *Sellew,* 99 U. S. 624, 626; *United States* v. *Schurz,* 102 U. S. 378, 408; *Thompson* v. *United States,* 103 U. S. 480, 484; *United States* v. *Chandler,* 122 U. S. 643; *United States ex rel. The International Contracting Company* v. *Lamont,* 155 U.S. 303, 306; *United States ex rel. Long* v. *Lochren,* 164 U. S. 701. And, as early as 1897, this Court noted that the principle of abatement because of resignation from office had already "for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published." *Warner-Valley Stock Co.* v. *Smith,* 165 U. S. 28, 31.

The reason for this common law rule is evident. Resignation from office means that the officer "no longer possesses the power" to perform the official act demanded of him. *The Secretary* v. *McGarra-*

han, 9 Wall. 298, 313. Since his duty to perform that act "exists only so long as the office is held, the court cannot compel [him] to perform it after his power to perform has ceased." *United States* v. *Boutwell,* 17 Wall. 604, 608.

Nor could the action be continued, without more, against the successor in office, inasmuch as that officer should certainly be afforded an opportunity to determine whether the act sought from his predecessor should be performed. The new official might be disposed to perform the act, without litigation, even though the former official refused to do so. See 31 Cong. Rec. 3866. While it is true that a writ of mandamus, and its equivalent, the mandatory injunction,[6] are sued out against the officers in their official capacity, the actions are personal in nature to the extent that the successors are not privy to their predecessors' conduct, and may not therefore be brought into the action. *Warner-Valley Stock Co.* v. *Smith,* 165 U. S. 28, 32; *Allen* v. *Regents,* 304 U. S. 439; *Lyman* v. *Flood*

[6] At least as far as abatement is concerned, there can be no doubt that the writ of mandamus is no different from a mandatory injunction and is governed by like considerations. *Warner-Valley Stock Co.* v. *Smith,* 165 U.S. 28, 33; *Miguel* v. *McCarl,* 291 U.S. 442, 452. That the difference between the two forms of action is little more than verbal is demonstrated by the instant case. The complaint was filed as a "petition in the nature of mandamus." The district court, however, by the addition of such words as "enjoined" and "restrained" granted a judgment in the form of a mandatory injunction (R. 39, 40).

Prevention Association v. *City of Topeka*, 152 Kans. 484; cf. *Thomas B. Bishop Co.* v. *Santa Barbara County*, 96 F. 2d 198 (C.A. 9), certiorari denied, 305 U. S. 623.[7] This lack of authority to bring the new officer into the action was not remedied by his willingness to have the action continue against him. *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, 605. Thus, it was necessary at common law to abate the action and dismiss the proceeding against the officer who had resigned even where his successor was desirous of having the suit continued against him.

The need and desirability of a statute which would prevent abatement in these situations by allowing the action to be continued against the successor officer was suggested to Congress by this Court on March 21, 1898, in the *Butterworth* case, 169 U. S. 600, 605. Soon thereafter, H. R. 6901, entitled "a bill to prevent the abatement of certain actions," was introduced in the 2d Session of the

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[7] Furthermore, as far as appellate proceedings were concerned, another difficulty stood in the way of directing substitution of the successor. The power to direct a substitution and require the successor "to become a party to the suit, would be an exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor." *United States* v. *Boutwell*, 17 Wall. 604, 609. But this Court, apart from the specific exceptions provided in Article III, Section 2, of the Constitution, has no original jurisdiction. Nor did any statute confer original jurisdiction on the courts of appeals. See 28 U.S.C. 1291, 1292.

55th Congress, 31 Cong. Rec. 779. Discussion of the bill, in both the Senate and House, remove all doubt that the bill was designed to meet the need expressed in the *Butterworth case*. 31 Cong. Rec. 3866; 32 Cong. Rec. 492. Indeed, the Report of the House Committee on the Judiciary, in reporting out the bill favorably, is devoted chiefly to a discussion of that case. H. Rep. No. 960, 55th Cong., 2d Sess.

In its original form, H. R. 6901 provided that "no action" by or against a federal official "shall abate" because of his death or resignation, and authorized substitution of the successor within six months. 31 Cong. Rec. 3865. This was the form in which it was passed by the House. 31 Cong. Rec. 3866. In the Senate, the provision that "no action shall abate" was deleted and, in its stead, language allowing the actions to "be revived" against the successor was proposed. The Senate also extended the six-month period to twelve. 32 Cong. Rec. 493. The House refused to concur in the Senate amendments. 32 Cong. Rec. 727. After conference, the twelve-month change was accepted, but the provision that "no * * * action * * * shall abate" was restored, and the bill was enacted in that form as the Act of February, 1899, 30 Stat. 822.

Its language remained unchanged until revised by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941), the statutory provision involved in the instant case. The bill, which became the Judiciary Act of 1925, was prepared and approved

by the then Justices of this Court. H. R. 8206 and S. 2060, 68th Cong., 2d Sess.; see 66 Cong. Rec. 2755, 2877; H. Rep. No. 1075, 68th Cong., 2d Sess., pp. 2, 8. Since its chief purpose was to enlarge this Court's discretionary or certiorari jurisdiction, and thereby lessen the number of unimportant cases which had consumed the Court's time, the debates, as well as recommended changes, were directed to that aspect of the bill. 66 Cong. Rec. 2876-2880; 2752-2758; 2916-2926. No changes were made, however, with respect to Section 11. That section of the bill, passed in the form in which it was originally prepared and approved by the Justices of this Court, differs substantially from the text of the 1899 Act which it replaced. It is to those differences we now turn.

B. The Language of Section 11.

Of chief importance here is Section 11's elimination of the heart of the 1899 Act, that is the provision that "no * * * action * * * shall abate." Instead of the imperative command that actions shall not abate, which the House successfully insisted upon in the former Act despite Senate opposition, Section 11 merely authorizes the continuance of cases against the successor officer "if within six months after [the former officer's] death or separation * * * it be satisfactorily shown to the court that there is a substantial need * * *" for doing so. Section 11, *supra*, p. 3. Whereas the 1899 Act prevented pending litigation from abating despite the lack of timely substitution, the language of the

1925 Act specifically made survival dependent on timely substitution.

An equally important restriction, not contained in the 1899 Act, was imposed by paragraph (c) of Section 11. It added a new provision requiring that notice of the application for substitution be given to the "party or officer" to be affected by the proposed substitution, and according him "an opportunity to present any objection which he may have." Section 11(c), *supra*, p. 3.[8] This requirement that the new officer be notified of the application for substitution necessarily presupposes that the party who had instituted suit against his predecessor has the duty of making that application. Likewise, giving the new officer the opportunity to object to the proposed substitution can only mean that the burden rests with the private party who brings the suit, and not with the public officer defendant, to obtain the substitution order. No other reading of Section 11(c) makes sense.

Also significant in connection with the additional limitations imposed by Section 11 is the fact that it shortened to six months, the former full year period allowed for substitution by the 1899 Act. Taken together, these changes and restrictions con-

[8] Under the 1899 Act, a showing to the court of the "necessity for the survival" of the action "to obtain a settlement of the questions involved" was sufficient to warrant the order of substitution.

stitute a clear direction that an action will abate unless the plaintiff fully complies with the provision for substitution of a successor public officer after the resignation of his predecessor.

C. The Rulings of This Court Show That Abatement of the Instant Action Could Have Been Avoided Only by Compliance With Section 11.

The decisions of this Court construing the 1899 and 1925 Acts, which note the different results dictated by each in the event of failure to effect timely substitution, show that the court below properly vacated the judgment of the district court.

LeCrone v. *McAdoo,* 253 U.S. 217, was the first case which squarely presented to this Court the problem of the effect of a failure to substitute within the twelve-month period allowed by the 1899 Act.[9] In that case, suit was originally instituted against McAdoo, as Secretary of the Treasury. After the trial court's judgment was affirmed by the court of appeals, this Court pointed out that McAdoo had resigned and that his successor had not been substituted within twelve months. 253 U.S. 217, 219. However, because of the clear declaration in the 1899 Act that "no * * * action * * * shall abate," the case was not remanded with instructions to dismiss the action as abated. Instead, the judgments of the trial court and the

[9] *Murphy* v. *Utter,* 186 U. S. 95, decided in 1902, mentions the 1899 Act, but does not discuss its effect.

court of appeals were left intact, and the writ of error merely dismissed. The 1899 Act was similarly applied in *Payne* v. *Industrial Board of Illinois*, 258 U.S. 613, in *United States ex rel. Wattis* v. *Lane*, 255 U.S. 566, and in *Payne* v. *Stevens*, 260 U.S. 705. In each case the failure to effect a timely substitution, while requiring a dismissal of the writ of error, did not, because of the peremptory command of the statute that the proceeding should not abate, require any abrogation of the judgments of the lower courts on the ground that the action had abated.

Exactly opposite results, however, were compelled by Section 11 of the 1925 Act. Unlike the 1899 Act, Section 11, as has been noted, contained no provision that actions shall not abate. Consequently, this Court, in applying Section 11 where there had been a failure to move for substitution within the six-month period allowed by that section, "vacate[d] the judgments entered in the District Court and in the Circuit Court of Appeals and remand[ed] the cause to the District Court with a direction to dismiss the cause as abated." *United States ex rel. Claussen* v. *Curran*, 276 U.S. 590, 591; *Matheus* v. *United States ex rel. Cunningham*, 282 U.S. 802. Accord: *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014 (C. A. 3), where the court of appeals vacated its own judgment as well as that of the district court and remanded the case to the district court. The

Claussen and *Trinler* cases were held to have abated despite the Government's express statement of its willingness to waive the objection if that were possible. There being no express command in Section 11 that the action shall not abate, it is clear that the entire proceeding abates upon the expiration of the six-month statutory period unless a proper substitution has been made for the public officer who has vacated his office.

These cases and the difference in results caused by failure to comply with each of the substitution statutes have only recently been reconsidered by this Court. In *Defense Supplies Corp.* v. *Lawrence Co.*, which involved a statute having "substantially the same" language as that of the 1899 Act, this Court emphasized (336 U.S. 631, 637-638):

> * * * The statutory language construed in the *LeCrone* and *Payne* cases [*i. e.*, under the 1899 Act] was substantially the same as that under scrutiny now, and the court held only that the actions were "at an end" in this court after the year given for substitution had expired—that after that year, we had no jurisdiction to review the merits. The court did not suggest that the courts below had entered their judgments improperly. It simply dismissed the writs of error. But in 1925 the statute was amended. The command, "no action shall abate," was omitted; the new provision made it unmistakably clear that the validity of the judgment was conditional upon substitution. And when called upon to inter-

pret the new statute, we went further than we had in *Payne* and *LeCrone*. We vacated the judgments below, and remanded to the District Court with a direction to dismiss the cause as abated. *United States ex rel. Claussen* v. *Curran, supra.*

Since the provisions of Section 11 of the 1925 Act control the instant case, there is no doubt that the court below, in vacating the judgment of the district court and remanding the case to that court with directions to dismiss the complaint as abated did precisely what this Court, in the *Lawrence, Claussen,* and *Matheus* cases, said must be done under Section 11.

This firmly established rule, requiring abatement and dismissal where there has been a failure to effect timely substitution, is not seriously challenged by petitioner. Instead, she seeks to avoid the impact of the rule by contending (1) that Section 11 does not apply to a judgment in mandamus entered against a public officer prior to his death or resignation, (2) that Section 11 is inapplicable to the instant case because no valid appeal was taken from the district court's judgment and that there was, therefore, no case pending in any court at any time after Rear Admiral Buck resigned, and (3) if Section 11 is applicable to the case at bar, her failure to comply therewith is justified "under principles of estoppel."

1. (a) Petitioner's contention that Section 11 does not apply in the instant case is based on the

assumption that no judgment entered against a public officer defendant prior to his death or resignation abated at common law. From this premise, petitioner argues that Section 11 does not affect the judgment entered in the instant case because Congress, in enacting Section 11, intended only to relieve against the inequities of the common law, and did not intend that the section would cause the abatement of any proceeding that would not have abated at common law. Petitioner's assumption that the judgment would not have abated at common law is erroneous. The case of *Iron Gate Bank* v. *Brady*, 184 U.S. 665, cited by petitioner, does not support the contention that a judgment in mandamus did not abate at common law upon the death or resignation of the public officer defendant.[10] That case merely held that a tort action brought against a collector of internal revenue abated upon the collector's death. The opinion in that case refers to *Patton* v. *Brady, Executrix*, 184 U.S. 608, wherein it was held that an action in assumpsit brought against the same collector to recover an erroneously collected tax, did not abate upon his death.

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[10] Petitioner also relies upon general statements in Corpus Juris to the effect that a judgment does not abate at common law, citing 1 C. J. [pp. 169-170], Sections 288-289, notes 65, 66, and 71, and 1 C. J. S. [pp. 172, 174], Sections 124 and 127 (Br. pp. 7-8). None of the cases collected under these general statements hold that a judgment granting a writ of mandamus against a public officer did not abate at common law upon his death or resignation.

Suits in assumpsit brought against collectors of the revenue are plainly distinguishable from the case at bar. They are maintainable only where a tax has been erroneously collected over the protest of the taxpayer. In those cases, the revenue officer is personally liable in his own property for any judgment entered, and the judgment may be enforced against his estate. Consequently, such actions did not abate at common law, and since judgments entered therein were collectible from the personal estate of the defendant there was no reason to abate such judgments upon his death or resignation. The nature and effect of such actions are clearly shown by the decisions of this Court. *Patton* v. *Brady, Executrix, supra; Sage* v. *United States,* 250 U.S. 33; *Lowe Bros. Co.* v. *United States,* 304 U.S. 302; *Smietanka* v. *Indiana Steel Co.,* 57 U.S. 1; *Union Trust Co.* v. *Wardell,* 258 U.S. 537.

Actions for mandamus, however, seek only a coercive remedy against the public officer defendant. He is not answerable in his own estate for any payment which the action seeks, but is ordered by the court to perform an act which may or may not require the payment of money. If he disobeys the order he may be coerced by the court to comply with it, but he is not liable in his estate for the judgment, as is the defendant in an action in assumpsit. In the circumstances, the court can compel compliance with its order only so long as the

public officer defendant is in office and able to perform the act which the court directs shall be performed. The writ of mandamus does not reach the office, but is personal to the defendant. Since the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. It necessarily follows that upon the death or retirement from office of the defendant, the writ must abate. *United States* v. *Boutwell,* 17 Wall. 604, 607-608; *United States ex rel. Bernardin* v. *Butterworth,* 169 U.S. 600, 602; *Caledonian Coal Co.* v. *Baker,* 196 U.S. 432, 440.

(b) Petitioner asserts that none of the cases in which abatement has been ruled necessary, "involve a judgment entered *against* an officer of the Government prior to his death or resignation from office" (Br. p. 7). Even if this statement were entirely correct, it would mean only that the courts have not had occasion to apply the rationale of the abatement rule in cases where coercive judgments have been entered against public officers under those circumstances, for we find no decisions holding that such judgments do not abate. Actually, however, this Court has abated cases in which coercive judgments have been entered prior to the death or resignation of the public officer.

Thus, in *United States ex rel. Long* v. *Lochren,* 164 U.S. 701, a judgment in mandamus against the Commissioner of Pensions had been entered by the trial court, and this Court dismissed the writ of

error[11] on the authority of the *Boutwell* case, *supra*, wherein it had held that upon the death or retirement of a public officer defendant the writ [of mandamus] must abate. And in *Matheus* v. *United States ex rel. Cunningham*, 282 U.S. 802, a habeas corpus proceeding, wherein the court of appeals had reversed the trial court's dismissal of the writ and had ordered that judgment be entered in favor of the relator, this Court held that the entire proceeding had abated and directed that the cause be remanded to the district court with directions to dismiss the proceeding as abated.[12]

As we have shown above, the resignation of a public officer defendant requires abatement of the action because his resignation has rendered him

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[11] In that case the Solicitor General, representing the Commissioner of Pensions, did not request that this Court order the action dismissed *ab initio*. See Motion to Dismiss and Brief in support thereof filed by the Solicitor General in the *Lochren* case, No. 333, October Term, 1896. Since the trial court's judgment against the public officer had been reversed by the court of appeals, no purpose would have been served by such a request. Moreover, there apparently was, at that time, some doubt whether this Court had jurisdiction to order the entire proceeding dismissed (See also *Pullman Co.* v. *Croom*, 231 U. S. 571, 577), as it did later in *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, and *Matheus* v. *United States ex rel. Cunningham*, 282 U. S. 802, after Section 11 had been enacted. See 28 U. S. C. 2106, which clearly authorizes such action.

[12] See also *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014 (C. A. 3), wherein the court of appeals, after the resignation of the defendant, vacated its own decree against the public officer, and remanded the case to the district court with directions to dismiss the proceeding as having abated.

powerless to perform the official act demanded of him. Obviously, the reason for the abatement is as forceful where the resignation occurs after the entry of the judgment as where it takes place prior to its entry, and whether the judgment was adverse to or in favor of the official. In both situations the determinative factor is that the officer's resignation renders him powerless to perform further official acts, and the court is necessarily without power to compel him to perform acts of that character.

In reality, the reason behind the abatement is that the cause has become moot, since after the resignation, in the absence of a proper substitution, the court is without power to enter a judgment or to enforce one that has been entered. In short, the nub of the entire matter is that there is no longer any subject matter on which the court can act. And this is true whether or not a judgment has been entered against the officer. Thus, in this case, after Rear Admiral Buck's retirement, he could not, as Paymaster General of the Navy, pay the amount demanded.[13] Consequently, upon the retirement of Rear Admiral Buck, the case at bar became moot, and the entire action, including the judgment entered by the trial court, abated upon the expiration of the six-month statutory period for substitution. In the circum-

[13] The complaint makes no claim against him in his personal capacity.

stances, the court below was clearly correct in directing that the judgment be vacated and the entire proceeding be dismissed. This Court has long followed that procedure in moot cases. See *Brownlow* v. *Schwartz,* 261 U.S. 216; *United States* v. *Hamburg-American Co.,* 239 U.S. 466, 475; *United States* v. *American-Asiatic S. S. Co.,* 242 U.S. 537; *Berry* v. *Davis,* 242 U.S. 468, 470; *Board of Public Utility Commissioners* v. *Compania General,* 249 U.S. 425; *Commercial Cable Co.* v. *Burleson,* 250 U.S. 360; *Heitmuller* v. *Stokes,* 256 U.S. 359; *New Orleans Flour Inspectors* v. *Glover,* 160 U.S. 170 and 161 U.S. 101; *United States* v. *Schooner Peggy,* 1 Cranch 103; *Retail Food Clerks and Managers Union* v. *Union Premier Food Stores,* 308 U.S. 526; *Woodring, Secretary of War, et al.* v. *Clarksburg-Columbus Short Route Bridge Co.,* 302 U.S. 658; *Leader et al.* v. *Apex Hosiery Co.,* 302 U.S. 656; *Bracken* v. *Securities and Exchange Comm'n,* 299 U.S. 504. The same procedure has been followed in criminal cases where the defendants have died after judgment and pending appellate proceedings. *List* v. *Pennsylvania,* 131 U.S. 396; *Menken* v. *Atlanta,* 131 U.S. 405.[14]

2. Another contention advanced by petitioner is that Section 11, which by its terms covers "pend-

[14] See also *Metzger* v. *O'Donoghue,* 288 Fed. 461, wherein the Court of Appeals for the District of Columbia followed that procedure in a disbarment proceeding after the disbarred attorney had died.

ing" actions, is inapplicable to the instant case, her assumption being that the action was merged into the judgment from which no valid appeal was taken,[15] and that the action "was not pending either in the District Court or in the Court of Appeals" at any time after Rear Admiral Buck's resignation (Br. 14-16). The entry of a trial court judgment does not mean that the case is no longer pending. *Wegman* v. *Childs,* 41 N. Y. 159. See *Mitchell & Rammelsburg Furniture Co.* v. *Sampson,* 40 Fed. 805 (C.C.N.D. Fla.); *Ulshafer* v. *Stewart,* 71 Pa. 170; *Chapin* v. *James,* 11 R. I. 86; *Sweetser* v. *Fox,* 43 Utah 40. And, for the purposes of Section 11, it is settled that a "cause is still pending until judgment is satisfied." *Becker Steel Co. of America* v. *Hicks,* 66 F. 2d 497, 499 (C. A. 2), certiorari denied, 290 U. S. 667. On no other basis could this Court have applied the substitution requirements of Section 11 to the

[15] Petitioner's suggestion that Rear Admiral Buck's resignation does not stand in the way of holding him *personally* liable for the amount of the death gratuity (Br. p. 8), is plainly inconsistent with her contention that the judgment was of no concern to him and that he had no right to take an appeal. The judgment, of course, directed him to perform the official duty of paying the death gratuity. Obviously, it was not intended that he should pay the gratuity from his personal funds, for he had no personal liability to petitioner, nor was any alleged. Respondent was, however, subject to the coercive authority of the court, and, in that respect, he had a personal interest in the judgment sufficient to warrant his taking the appeal, at least until the expiration of the six-month period permitted by Section 11, *supra*, p. 3, for substituting his successor.

Claussen and *Matheus* cases, *supra*, p. 24, in which the judgments were entered by the district courts far in advance of the resignation of the public officials involved. Furthermore, limiting the word "pending", as suggested by petitioner, would conflict with the reason underlying the rule of abatement. Satisfaction of judgment against a public officer in his official capacity is, of course, conditional upon that officer's availability to perform the official act required by the judgment. If he resigns before complying with the judgment, he no longer can comply with it, and the need for substituting the new incumbent who can comply, consequently arises.

Petitioner's contention that no valid appeal was taken from the judgment of the trial court because Real Admiral Buck's retirement preceded the taking of the appeal, rests largely on the decision of this Court in *Davis* v. *Preston*, 280 U. S. 406. In that case, Davis was the statutory agent of the United States for the purpose of the suit. While so acting, a money judgment was rendered against him in that capacity. After he had ceased to be agent, he filed a petition for a writ of certiorari in this Court, which was granted. This Court held that after he had ceased to be agent, the judgment was of no concern to him, and that he had no authority to seek review by this Court. That decision is plainly inapposite. Since Davis was sued in the capacity of agent of the United States, the suit reached the office, not the individual, and authority

to act had passed to his successor, who had not been made a party within the period in which review could be sought. When Davis ceased to be agent, he, like any other agent, lost all authority to act for his principal. Consequently, he had no authority to seek review of the case when he was no longer agent of the United States for the purpose of the suit.

If the case at bar is not moot it must be because Rear Admiral Buck was sued in his personal capacity in a coercive action which did not reach the office. If this is so, it obviously was proper for him to seek review during the period provided therefor, his successor not having been substituted during that period. He would then have had a personal interest in the case, since he was subject to the coercion of the trial court, and his failure to comply with the judgment might, in the absence of an appeal, have subjected him to contempt process. It follows that the judgment was of serious concern to Rear Admiral Buck and he therefore had ample authority to take the appeal. Consequently, the *Davis* decision does not preclude him from seeking review of the judgment. We submit that there was an action pending in the court below within the meaning of Section 11, and that this contention of petitioner is without merit.

3. Equally lacking in merit is petitioner's contention that principles of estoppel justify her failure to move for substitution within the statu-

tory six-month period. This contention is based on alleged wilful deception. Petitioner states (Br. 17) that on March 18, 1948, after he had ceased to be Paymaster General, "Rear Admiral Buck purported to note and subsequently perfect an appeal as Paymaster General of the Navy and thereby *wilfully misled* the Courts and Madeleine Ursula Snyder to believe that he continued to hold the office of Paymaster" [italics supplied], and that on March 18, 1949, "Rear Admiral Buck disclosed the deception he had successfully carried out for one year."

We submit that it is manifestly unreasonable to attribute to Rear Admiral Buck or to the Government attorneys who handled the case any wilful intention to mislead or deceive the court or the petitioner at the time the appeal was taken in Rear Admiral Buck's name. It is, of course, true that if the federal attorney who was in charge of this case during the six-month period in which substitution was allowable and in which the appeal was taken had been advised of the change in office of the Paymaster General, he undoubtedly would have then brought the change to the attention of the lower courts. The fact is that through inadvertence he was not so advised. The failure of a federal attorney to learn of and, consequently, to suggest to the court the resignation of a public officer within six months after the happening of the event is, in view of the magnitude of government

litigation, frequently inevitable. That failure is, however, of no legal significance, for it can in no way be deemed to relieve a claimant, who seeks to compel a public officer to act, of the statutory requirements for substitution imposed *on that claimant* by Section 11(c). See *supra*, p. 22. The least that can be expected of such a claimant, in view of the statutory requirements, is that he will be sufficiently interested in his case, up until the time any judgment he recovers is satisfied, to make an inquiry once every six months as to the name of the present incumbent of the public office. Here, the opportunity to make such inquiry was as fully available to petitioner as to the government lawyers assigned to the case, a fact which in itself prevents the creation of an estoppel.

But, the mere fact that petitioner did not know that respondent had retired is insufficient, especially where, as here, the exercise of reasonable diligence would have apprised her of the change in office. Even before the six-month period had begun to run, the Congressional Record showed that Rear Admiral Foster's nomination to the office of Paymaster General had been confirmed by the Senate. 94 Cong. Rec. 1410, 1411.

Moreover, we are at a loss to understand what benefit petitioner would derive from the application of an estoppel in this case. Respondent no longer occupies the office of Paymaster General of the Navy, and it is, therefore, impossible for him to perform the duty which the judgment of the

trial court commands him to perform. Petitioner suggests that respondent may be held personally liable for the judgment, but that suggestion is entirely inconsistent with her further contention that he had no right to take the appeal. In any event, the suggestion that respondent is personally liable to petitioner is patently without merit.

D. *Abatement Does Not Leave Petitioner Remediless.*

It is important to note that affirmance of the determination that the cause has abated does not leave petitioner remediless. Abatement "defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way." Bouvier's Law Dictionary, Rawle's Third Revision, p. 7. Here, since the six-year limitation period under the Tucker Act [16] will not expire before 1952, petitioner is in no way barred from instituting a new action. Such an action, of course,

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[16] The petition filed in the district court in this case specifically invoked that court's jurisdiction under the Act of March 3, 1887 (*i.e.*, the Tucker Act). It is well-settled that a suit for the allowance provided by the death gratuity statute will lie in the Court of Claims or in the federal district courts under the Tucker Act. *Campbell* v. *United States*, 80 C. Cls. 836; *Hill* v. *United States*, 68 C. Cls. 740; *Maxwell* v. *United States*, 68 C.Cls. 727; *Thomson* v. *United States*, 58 C. Cls. 207; *Phillips* v. *United States*, 49 C. Cls. 703. Since the Navy Department denied petitioner's death gratuity claim on August 23, 1946 (R. 25), the six-year period allowed by the Tucker Act for the bringing of suit will not expire until August 22, 1952. 28 U.S.C. 1346(a) and 2401.

may prove to be no more meritorious than was her suit to recover the proceeds of a National Service Life Insurance policy. *United States* v. *Snyder*, 177 F. 2d 44 (C.A. D.C.). That fact, however, does not deprive her of the opportunity to litigate any issues not already decided.

E. *Should This Court Reverse The Decision Of The Court Below, The Remand Should Direct That The Case Be Considered On Its Merits*

If this Court should hold that the case abated, of course, affirmance is proper. If it should hold to the contrary, it is plain that the case should go back to the court of appeals for a decision on the merits.

Apparently recognizing the tenuous nature of her claim on the merits, and the likelihood of a ruling by the court below on remand, that the district court erred in awarding her a judgment on the merits, petitioner seeks refuge in the contention that this Court has no power to order a remand but only to order dismissal of the appeal, thus letting the judgment of the district court stand. The argument advanced comes to this: An appeal was noted on March 18, 1948, in the name of Rear Admiral Buck, from the district court judgment against him as Paymaster General. Buck was not in office on that date, having been succeeded on March 1 by Rear Admiral Foster. The latter was not substituted in the case and no

appeal was taken in his name within the 60-day period allowed by 28 U. S. C. 2107 for appeal to the court of appeals. These circumstances, petitioner urges, mean that neither Buck nor Foster took valid appeals within the 60-day period; that the court of appeals cannot therefore pass on the merits, and that this Court cannot remand the case for that purpose. By this attempt to deny the Government its right to appellate review, petitioner hopes to reap the benefits of a district court judgment which, had it been reviewed on the merits, would have been reversed.[17]

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[17] Adoption of petitioner's basic contention that an appeal from a district court judgment, to be valid, must be taken in the name of the *new* incumbent within the 60-day period allowed by 28 U. S. C. 2107, might seriously prejudice and inconvenience the Government and private litigants. It may be well to note a few of the possibilities: (1) If Buck instead of resigning on Maren 1, 1948, had resigned on March 28, petitioner's argument would require that a motion for substitution be made within a one-day period, that is, no later than March 29, 1948 (the end of the 60-day period for appealing from a judgment entered on January 29, 1948), and that the appeal be noted in the name of Rear Admiral Foster. This, of course, would in effect repudiate the 6-month period allowed now for substitution under Rule 25(d), and allowed formerly under Section 11 of the 1925 Act. In view of the magnitude of Government litigation, the one-day period is frequently inadequate even for the purpose of apprising the appropriate United States Attorney of the change in office. (2) Or, if Buck had resigned immediately after judgment was entered against him, and no new Paymaster General had been appointed and confirmed by the Senate until March 30, 1948, it is obvious that, under the view taken by petitioner, no Paymaster General would have been empowered within the 60-day period to take an appeal, and the Government's right

Petitioner does not suggest that this argument is founded on principle or reason. Instead, exclusive reliance is placed on this Court's decision in *Davis* v. *Preston*, 280 U. S. 406,[18] without any attempt being made to analyze the basis of that decision. As we have shown above, *supra*, pp. 34-35, that decision furnishes no support for petitioner's contention that no valid appeal was taken in this case, and, as we have further shown, respondent had a sufficient interest in the judgment to warrant his taking an appeal, *supra*, p. 35. The appeal being valid, the court below would unquestionably have had jurisdiction to consider the merits of the appeal had a timely substitution been made after the appeal was taken. It follows, of course, that if the decision of the court below abating the case is reversible, that court would, on remand, still have jurisdiction to consider the merits of the controversy.

If the judgment of the trial court should not have been vacated by the court below, it must be because that judgment has some value to petitioner, in which event there is necessarily a cor-

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to an appeal on the merits of the case would have been completely frustrated by the fortuitous and frequently necessary delay in filling the public office. (3) Similarly, if in the situation just described, a private litigant found it necessary to take an appeal, his right of appeal would also have been effectively destroyed.

[18] Petitioner also cites, without discussion, *Nudelman* v. *Globe Varnish Co.*, 312 U. S. 690, a *per curiam* order which simply cites the *Preston* case.

responding liability on respondent, for the judgment is personal to him and there are no other parties. If respondent is now liable to pay the judgment despite the abatement, he unquestionably has had a right at all times since its entry to defend himself against it. Petitioner's contention would deprive him of that right but would still call upon him to pay the judgment out of his personal funds.[19] The *Davis* case came to no such unreasonable conclusion, for Davis, who had ceased to be agent, was held not to be liable for the judgment. Adoption of petitioner's contention would not only be improper but would produce an unconscionable result, either of which is unquestionably a sufficient reason for its rejection.

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[19] Petitioner would have this Court direct the court below to dismiss the appeal and leave the judgment intact, in order that an action may be brought thereon in the district court (Br. 21), as was done by this Court in *Defense Supplies Corp.* v. *Lawrence Co.*, 336 U. S. 631. That case involved a money judgment recovered by Defense Supplies Corporation, a Government corporation. After the judgment was entered the corporation was dissolved and its assets were transferred to Reconstruction Finance Corporation, which had not been made a party by substitution. This Court held that the judgment recovered by the corporation did not abate upon the corporation's dissolution, and that in the circumstances of that case the judgment might be revived by the successor in interest. That case was governed by a special statute which expressly provided that the action should not abate. Consequently, the decision of this Court in that case cannot properly be taken as authority to revive a coercive judgment against a public officer after he has ceased to occupy the office, or against a succeeding officer who is not a party to the suit.

In the circumstances, if the judgment below is reversed, the case should be remanded to the court below to decide the appeal on the merits. Such remand is authorized by 28 U. S. C. 2106, and would afford both parties to the suit fair treatment and adequate protection. See, *e. g.*, *Jameson* v. *Railway Co.*, 111 Kans. 670, 672.

II

28 U. S. C. § 2105 may preclude reversal of the ruling of the court below

For the purpose of the foregoing discussion in Point I, we have assumed that this Court has jurisdiction to reverse the judgment of the court below should it consider that there was error in that court's ruling on the question of abatement. A serious question as to whether this Court has jurisdiction is raised by 28 U.S.C. § 2105, which provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

Unless the ruling in abatement by the court below can be said to "involve jurisdiction," § 2105 would seem to preclude reversal of the decision below.

What rulings in abatement can be said to involve jurisdiction is not clear in the absence of any authoritative pronouncement. It can be said that the lack of a necessary party—or indeed of any party—by reason of the retirement of a de-

fendant government official, deprives the court of jurisdiction over the case, so that the abatement for failure to substitute the official's successor may be treated as not subject to § 2105. But if petitioner is correct in contending that the judgment of the district court can stand despite the failure to substitute, the ruling below would not involve jurisdiction. and reversal by this Court would be barred.

When the Government sought review of a decision that a case had abated because of failure to substitute a new government official within six months, the Court of Appeals for the Seventh Circuit held that § 2105 applied, and that the order was not reviewable on appeal. *Bowles* v. *Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U.S. 861.[20] The Government believes that

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[20] The discussion of the present question by that Court of Appeals reads as follows:

> The sole issue presented to the District Court by defendants' motion to "dismiss or abate" the action was whether the action had abated due to the failure of Bowles' successor to make timely application for substitution. In deciding this issue, we think the court was unquestionably ruling upon a matter in abatement which did not involve jurisdiction. As the Supreme Court said in Fix, Collector of Internal Revenue v. Philadelphia Barge Co., 290 U.S. 530, 54 S. Ct. 270, 271, 78 L. Ed. 481, "Failure to comply with the statute (i.e. failure of a successor collector to make timely application for substitution (Section 780 Title 28 U.S.C.A.) forecloses the particular remedy therein provided; it does not destroy the right." So here, the District Court

case to have been improperly decided; but, if not, it is indistinguishable here. The only difference between the two cases is that in the *Wilke* case, a new action was barred by the statute of limitations, whereas there is no such obstacle to a new proceeding by the present petitioner. The *Wilke* case was thus a stronger one for concluding that the ruling in abatement was jurisdictional.

In other cases, this Court and courts of appeals have reviewed rulings in abatement where there has been a failure to substitute a proper government official. *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631; *Fix* v. *Philadelphia Barge Co.*, 290 U.S. 530; *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari denied, 334 U.S. 828; *Northwestern Lumber Co.* v. *United States*, 170 F. 2d 692 (C.A. 10). But in none of these cases was the question of the effect of § 2105 considered or discussed by the court.

As we stated in our petition for certiorari in the *Wilke* case, the apparent purpose of § 2105 was to prevent review of rulings in abatement which were not final, as where a plea in abatement is overruled. Even the Seventh Circuit, in hold-

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destroyed the pending action, but not the cause of action. In holding that the action had abated, the court had to determine first that the provisions of Rule 25(d) applied to Bowles' successor. If the court erred in its conclusion, it committed an error in ruling upon a matter in abatement which we are precluded by statute from reviewing. [175 F. 2d at 38].

ing itself compelled to deny review of final orders in abatement, has pointed to the harshness of the result, and its lack of foundation in reason. *McHie* v. *McHie*, 78 F. 2d 351, 353. The statute, accordingly, should be given a restrictive interpretation in cases in which its effect would be to deprive a litigant of all appellate review. Whether a case in which the litigant is not precluded from instituting another action falls within that category is, however, questionable, even though the order of abatement is final insofar as the particular proceeding is concerned.

Our conclusion from the above analysis is that § 2105 should be narrowly construed, and probably held inapplicable in the instant case on the ground that abatement for failure to substitute in this case can be regarded as jurisdictional, at least for purposes of construing § 2105. But if *Bowles* v. *Wilke* is believed to be good law, § 2105 would apply and this Court would lack jurisdiction to reverse the decision below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed; or if reversed, that it should be remanded to the court below for consideration of the merits.

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